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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

MELVIN I. UROFSKY, PAUL SMITH, BRIAN J. DELANEY, DANA HELLER, BERNARD H. LEVIN, and TERRY L. MEYERS,

Petitioners,

—v.—

JAMES S. GILMORE, III,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Evidently recognizing that the Fourth Circuit's ruling clashes radically with this Court's academic freedom decisions as well as precedents in other circuits, the Commonwealth of Virginia has attempted a diversionary strategy by manufacturing a problem of standing. No standing problem exists, however; on the contrary, as the Commonwealth it-

self argued in the court of appeals, the statutory amendment adding the term "lascivious" to Virginia Code §2.1-804-806 had little effect on the case because the plaintiffs' claims encompass a right to access art, literature, and scientific works that could reasonably be deemed "lascivious." Thus, the question whether state-employed scholars have any right of academic freedom in connection with their job-related research and writing -- as well as the other three questions presented in the petition -- are ripe for resolution by this Court.

The record is replete with evidence that the plaintiffs and other university professors have legitimate work-related scholarly interests in online sexually explicit material in the arts, sciences, law, and literature, that could be considered "lascivious." All six plaintiffs filed declarations in support of their motion for summary judgment that detailed their research, writing, and communications with other scholars in areas ranging from indecency law to Victorian poetry, psychosexual dysfunction to gay and lesbian studies. See Statement of Undisputed Facts, ¶¶32-98, J.A. at 238-66; Declaration of Brian Delaney (listing literature relevant to his research and teaching by Walt Whitman, Audre Lorde, Toni Morrison, Anne Sexton, Vladimir Nabokov, Norman Mailer, and Philp Roth); Declaration of Dana Heller (describing works by Allen Ginsberg and Kathy Acker and films examined in connection with her research such as *Blue Velvet* and *Go Fish*, in addition to lesbian comic book, *Hothead Paisan*, articles about pornographic magazines such as *Hustler*, materials on safe sex, and work by a Russian artist that featured "a nude woman with large breasts and erect nipples devouring a sausage in a rather explicit way"); Declaration of Bernard Levin (describing topics in psychology such as "aspects of adult or adolescent sexuality, Freud's libido concept, Freud's oral, anal, and genital stages of development, or Freud's concept of penis envy" and psy-

chology Web sites containing material on fellatio, fetishism, and other paraphilias); Declaration of Terry Meyers (outlining themes of flagellation, necrophilia, and sado-masochism in Swinburne and other "fleshly school" poets, lascivious poetry by the Earl of Rochester, novels by D.H. Lawrence, and listserves on Victorian sexuality);[1] Declaration of Paul Smith (explaining contemporary academic field of cultural studies, including research on pornography and the politics of fantasy, commodification of women's bodies, and discourses about gender and sexuality);[2] Declaration of Melvin Urofsky (describing research into online indecency, including Web sites and chat rooms).[3]

All of the courts below credited this evidence, and the Commonwealth did not contest it. Indeed, the statutory amendment which the Commonwealth now claims deprives all six plaintiffs of standing was added before the *en banc* proceedings below, yet the court of appeals perceived no problem with standing, and the Commonwealth did not suggest one. Instead, it took the position that addition of the term "lascivious" simply clarified the original intention

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[1] Professor Meyers's work thus includes, but is not limited to, the VIVA databases made available by the Commonwealth.

[2] Professor Smith's research and writing in connection with lascivious sexually explicit content encompasses much more than a handful of images on his Web site. Moreover, the Commonwealth's notion that visual imagery unaccompanied by text cannot constitute research or publication is spurious. Web sites, in any event, inherently link images and text.

[3] Professor Urofsky's investigations into online indecency included but were not limited to gathering material for potential class assignments. The Commonwealth's effort to deprive him of standing because "control of curriculum" is not an issue in this case misapprehends the job of professors in *researching* materials that they may then incorporate into their teaching.

of the law, and that the parties "continue to have a stake in the litigation" because of the plaintiffs' consistent claim that their First Amendment-based academic freedom right "applies even when the materials are lascivious." Response of Appellant to Plaintiff-Appellees' Memorandum Concerning Mootness at 5-6.

As the plaintiffs stated in their brief to the court of appeals:

> Countless works of art, from the sensuous nudes of Titian, Goya, or Renoir to explicit depictions by Schiele or Courbet, can easily be seen as lascivious, and in many cases were meant to be. The same is true of literature, from Aristophanes' *Lysistrata* to works by Henry Miller, John Updike, Toni Morrison, or Erica Jong. Many would undoubtedly consider passages in works of politics or social science to be lascivious – for example, descriptions of prison rape (J.A. 275; exh. 11 to Wheeler Decl.), psychological abstracts on vibrator use (J.A. 274), or the *Final Report* of the 1986 Attorney General's Commission on Pornography, which contains detailed plot summaries of pornographic films. Scholars simply cannot be barred from studying all that might be "lascivious" in human culture, or required to obtain a license before doing so.

Brief of the Appellees, at 15-16.

The Commonwealth also asserts, without any basis in the record, the prior proceedings, or the petition for *certiorari*, that the petitioners have "abandoned" their facial challenge to the Act. All of the courts below treated the case as a facial as well as an as-applied challenge, and nothing in the petition for *certiorari* changes that posture.

Indeed, the questions presented, which flow directly from the Fourth Circuit *en banc* majority's sweeping denial of any First Amendment protection for any scholar or other public employee in connection with his or her work, are all framed in terms of the facial challenge.

The Commonwealth seems to believe that by not explicitly using the words "overbreadth" or "vagueness" in any of the four questions presented, petitioners abandoned not only these particular claims but also their facial challenge. Facial challenges are not limited, however, to specific claims of overbreadth or vagueness. Here, the statute is challenged on its face as a direct interference with the rights of scholars and other public employees engaged in intellectual work. Moreover, the Fourth Circuit's ruling was so sweeping that it automatically disposed of the First Amendment-based overbreadth and vagueness claims. If this Court reverses on the overarching constitutional issue, then it (or the courts below) could properly proceed to resolve not only the question of First Amendment balancing but the questions of vagueness and overbreadth.

CONCLUSION

For the foregoing reasons and for the reasons set for in the petition for a writ of *certiorari*, the writ should be granted.

Respectfully submitted,

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